IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.380 OF 2006

1.Sheldon D'Silva & others. ...Petitioners.

vs.

Concept Hospitality Ltd. ...Respondent.

Mr.S.C.Naidu i/b. C.R.Naidu & Co. for Petitioners.

Mr.Abhay Abhyankar, Sr. Advocate with Atul G. Damle, for Respondent.

CORAM: D.K.DESHMUKH, J.

DATED: 27th November,2006..

P.C.:-

1. By this petition filed under section 34 of the Arbitration and Conciliation Act, the petitioners challenge the Award made by the sole Arbitrator. The challenge to the Award is basically on the ground that the appointment of the Arbitrator is not in accordance with the arbitration agreement. According to the petitioners, according to the arbitration clause a person who is legal adviser or legal consultant appointed and retained at that period of time by the respondent could

be appointed as sole arbitrator. The Arbitrator who has made the Award, according to the petitioners, was not the legal adviser/legal consultant appointed and retained at that period of time by the respondent-Company and therefore, he could not have acted as sole arbitrator. The dispute between the parties arose in December,2004, therefore, according to the petitioners only a person who was appointed or retained as legal consultant or legal adviser by the respondent at that time could have been appointed as arbitrator. The petitioner raised an objection before the learned Arbitrator that he has no jurisdiction to make the Award because he does not possess qualification necessary for being appointed as Arbitrator. The learned Arbitrator however, has rejected the challenge to his jurisdiction by order dated 7.1.2006 holding that he is an independent person recommended by the Labour Consultants M/s.S.S.Puri & Co., a Law firm which is retained by the respondent. After rejecting the objection raised by the petitioners, the sole arbitrator has made the Award.

2. The learned Counsel appearing for petitioners submits that considering the qualification laid down by clause 14 of the Contract between the parties, the learned Arbitrator who has made the Award could not have been appointed as arbitrator. The learned Counsel appearing for respondent on the other hand submits that an objection under Section 13 of the Arbitration and Conciliation Act to

the qualification of a person who has been appointed as arbitrator can be raised within 15 days after the person who is raising the objection becomes aware that the arbitrator does not possess the requisite qualification. The learned Counsel submits that in the present case the objection was not raised within the time. Clause 14 of the contract between the parties is relevant which reads as under:-

> "14. In case of any dispute and/or differences either in terms of interpretation of this agreement or its terms and conditions thereof, both the parties it is agreed that our Legal Advisor/Legal Consultant appointed and retained at that period of time by the Company shall be the sole arbitrator to resolve the said dispute as per the provisions of the arbitration and reconciliation Act,1996 and his awards shall be binding and conclusive to both the parties."

Perusal of this clause shows that a person who has been appointed or retained as legal adviser or legal consultant at the period of time when the dispute arose between the parties can be appointed as sole arbitrator. This was precisely the objection raised by the petitioners that the sole arbitrator appointed by the respondent was neither legal adviser nor legal consultant of the respondent company who was appointed or retained by the respondent company under the clause. Perusal of the order wherein objection raised by the petitioner has

been decided shows that after considering whether a person who is an advocate can only be appointed as legal adviser or not, the learned Arbitrator has observed that his name has been recommended for being appointed as arbitrator by the law firm which is engaged by the respondent-company and that he is an independent person. In my opinion, it is clear that even according to the respondent, the sole Arbitrator who has made the Award was neither retained nor appointed as legal adviser or legal consultant by the respondent company at the relevant time. Therefore, the sole arbitrator who has made the Award could not have been appointed as Arbitrator.

3. So far as the submission that the objection was not raised within the time allowed by section 13 of the Arbitration Act is concerned, though the objection was raised in writing before the learned Arbitrator and it was opposed by the respondent, the objection was not opposed on the ground that the objection has not been raised within time. An objection can be raised within a period of 15 days from the date on which the person who is raising the objection becomes aware of the ground on which the objection is raised. Had the objection that the challenge has not been raised within time been raised before the arbitrator, it was open to the petitioner to disclose the date of his knowledge about the lack of qualification of the sole arbitrator. In my opinion, having failed to raise the objection before

the learned Arbitrator, the respondent cannot be allowed here to raise for the first time the objection that the objection is not raised within time. In my opinion, it is clear considering the language in the arbitration clause that the sole arbitrator is lacking the qualification for being appointed as Arbitrator, and therefore, he could not have been appointed as Arbitrator. Therefore, the objection raised to the jurisdiction was wrongly decided by the arbitrator. Therefore, the Award made by the sole arbitrator is liable to be set aside. The present petition succeeds and is allowed. The Award impugned in the petition is set aside. It is clarified that the Award is being set aside on the ground of lack of qualification of the arbitrator provided for in the arbitration clause, to make the Award. The respondent would be free to adopt the remedy which will be available to him under the law.